IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1552 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DIPAK NATVARLAL LUHANA

Versus

COMMISSIONER OF POLICE

Appearance:

MR PRAVIN GONDALIYA for Petitioner

Mr. SK Patel, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 24/04/2001

ORAL JUDGEMENT

The present petition is preferred by the petitioner-detenu who has been detained by an order of the detaining authority dated 14.9.2000 in exercise of

powers under sub section (1) of section 3 of the Gujarat Prevention of Anti Social Activities Act, 1985 (hereinafter referred to as "the PASA Act"). The petitioner challenges the impugned order of detention availing the protection under Article 21 and 22 of the Constitution of India and had, therefore, approached this court with this petition under Article 226 of the Constitution of India.

2. In this petition, rule was issued by this court on 7.3.2001 and it was directed to be placed for final hearing after service of rule in seriatim as per chronological order of actual date of execution of the order of detention. In this matter, the detaining authority namely Police Commissioner, Rajkot City has filed affidavit in reply which is on record of this petition.

3. The facts of the case are that the impugned order of detention came to be passed by the Commissioner of Police, Rajkot City on 14.9.2000 on the ground that one offence has been registered against the petitioner at Rajkot Taluka Police Station, Rajkot City being CR No. 88 of 2000 dated 15.6.2000 for the offence under section 66B, 65A,E; 116B, 81 and 83 of the Prohibition Act. The detaining authority recorded subjective satisfaction about the petitioner being a dangerous person as defined under section 2(c) of the PASA Act. In the grounds of detention communicated to the detenu, the detaining authority has considered the sole offence registered against him for branding him as a bootlegger and has considered that the petitioner has been released on bail in connection with the said offence and the proceedings for cancellation of bail would be time consuming process and in the mean time, the petitioner may continue his illegal and anti social activities endangering the maintenance of public order and public health. The detaining authority therefore, ultimately came to the conclusion that there is no other remedy but to detain the petitioner under PASA to prevent him from pursuing his illegal and anti social activities.

3. The petitioner has challenged the impugned order of detention on various grounds raised in the petition. However, during the course of hearing of the present petition, Mr. Gondalia, learned advocate for the petitioner has submitted that there is non application of mind by the detaining authority on the question of considering the possibility of cancellation of bail. He has further submitted that the petitioner was arrested in connection with the aforesaid offence and on 17th June,

2000, he was ordered to be released on bail. He has further submitted that at the time when the petitioner moved an application for bail, such an application was not opposed by the detaining authority. He has submitted that on 17th June, 2000, the detenu was ordered to be released on bail and the impugned order of detention came to be passed on 14.9.2000. During this interregnum period also, the detaining authority was having option to move for cancellation of bail granted on 17th June, 2000. He has further submitted that it was not the case of the detaining authority that during this interregnum period, the petitioner was found to have been involved in such similar type of activities. If he would have been really a dangerous person as defined under section 2(c) of the PASA Act, then there would have been the statements of the secret witnesses while claiming privilege under the Act. However, in this case, no such statements of the secret witnesses have been recorded while claiming privilege under the Act. According to him, the detaining authority ought to have considered that the petitioner has not been involved in any unregistered offences and in the offence registered against him as stated aforesaid, the prosecution has cited the witnesses for the prosecution and non consideration of this aspect has vitiated the subjective satisfaction of the detaining authority. According to him, since there was no any untoward incident during the interregnum period, there was no any urgent threat to the maintenance of public order and therefore, the detaining authority ought to have considered the lesser drastic remedy of cancellation of bail. In view of the absence of any untoward incident during the interregnum period, the detaining authority ought to have resorted to the proceedings under section 437(5) of the Code of Criminal Procedure, 1973 before resorting to detaining the petitioner. According to Mr. Gondalia, the petition deserves to be allowed on this ground alone.

Mr. Gondalia, learned advocate appearing for the petitioner herein has confined his arguments to this aspect and has further submitted that in view of the decision taken by a Division Bench of this Court in Letters Patent Appeal No. 1056 of 1999 in Special Civil Application No. 8650 of 1998 on 15.9.1999, there is gross non application of mind on the part of the detaining authority. In that case, the detenues were on bail and the question of getting the bail cancelled was not considered by the detaining authority and the Court held that there is non application of mind. According to him, therefore, the the detaining authority ought to have

considered the possibility of resorting to the remedy of opposing the grant of bail at the time when it was preferred by the petitioner and after it was granted, ought to have immediately initiated the proceedings for cancellation thereof. The detaining authority waited from 17.6.2000 when he was released on bail till 14.9.2000 and on 14.9.2000, without resorting to the proceedings under section 437(5) of the Code, passed the impugned order of detention though there was no urgent or imminent threat to the maintenance of public order. Non consideration of this aspect has vitiated the subjective satisfaction and, therefore, the petition is required to be allowed.

4. Mr. SK Patel, the learned Asstt. G.P. appearing for the respondent authority has opposed the present petition. According to him, the decision of this court in the case of Mamad Abbas Jasraya v/s. Additional Chief Secretary, Government of Gujarat, Home Department and others reported in 1994 (2) GLR 1209 will be squarely applicable to the facts of the present case. In the said decision, the detenu was in custody and the Court came to the conclusion that considering the antecedents of the detenu, it was necessary to detain him even while he was in custody. According to him, in the instant case, the petitioner has been involved in one registered offences as per the grounds of detention and, therefore, the impugned order of detention cannot be said to be vitiated on the ground of non application of mind.

5. Having regard to the facts of the case, there is no dispute about the factual aspect that the petitioner is involved in one offence as aforesaid. In the grounds of detention the detaining authority has considered that in connection with the offences registered against him, the petitioner has been released on bail and after his being released on bail, may continue his illegal anti social activities. The detaining authority has not considered that the the proceedings under section 437(5) could be initiated for cancellation of bail on the ground that it would be a time consuming process. According to my view, non consideration of this lesser drastic remedy has vitiated the subjective satisfaction of the detaining authority.

6. It is true that this Court, in the case of Mamad Abas Jasraya (supra), this Court has observed as under:

> "Now, taking this ratio of the judgment and applying to the facts of the present case, it is clear from the grounds of detention itself that the detaining authority was aware of the fact

> that the petitioners were in custody. Further, the detaining authority was also aware of the fact that previously, the petitioners had made frequent applications for bail in the lower court and further looking to the nature of the antecedent activity namely illegal importing of such huge quantity of contraband gold would clearly indicate that they would certainly make applications for bail to the higher courts and after their release, they would engage in any such activities and, therefore, it was necessary to detain the petitioners in order to prevent them from engaging in such activities. "

But, at the same time, in a more recent judgment relied upon by Mr. Gondalia, in Letters Patent Appeal Appeal No. 1056 of 1999 in Special Civil Application No. 8650 of 1998 dated 15.9.1999, in case of Yunusbhai Hasanbhai Ghanchi versus District Magistrate, this court, after considering the decision of the division bench of this Court in case of Zubedabibi Rasidkhan Pathan v/s. State of Gujarat and others reported in 36(2) GLR 1134, came to the conclusion that the detaining authority has to consider the question of cancellation of bail. In that case, the detenu was on bail and the authority has not considered the possibility of getting the bail cancelled and the court has, therefore, held that there is non application of mind by the detaining authority. In the instant case, more than two months period has gone after the petitioner was released on bail in connection with the aforesaid offence and in the mean time, from the grounds of detention, it does not appear that the detenu has been involved in such similar type of activities. In view of these facts, the detaining authority ought to have given consideration to the proceedings under sec.437(5) of the Code. Non consideration of such a lesser drastic remedy has vitiated the subjective satisfaction of the detaining authority. If the detention order is seen alongwith the grounds of detention, it is amply clear that these material aspects have not been considered by the detaining authority. This is, therefore, a case of clear non application of mind on this important and vital aspect and, therefore, the subjective satisfaction would stand vitiated. On this ground alone, the petition deserves to be allowed.

In case of Ramesh Yadav versus District Magistrate, Ita and others reported in 1985 (4) SCC 232, the apex court has observed as under in paragraph 6 as under:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail, he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act would not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in a series of cases relating to preventive detention. The impugned order has therefore, to be quashed."

Therefore, in the facts and circumstances of the case and also considering the decision of the apex court in case of Ramesh Yadav (supra) as also the decision of the division bench of this court referred to hereinabove, the petition is required to be allowed by quashing the impugned order of detention.

For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 14.9.2000 is vitiated and resulted to quash and set aside. The detenu Deepak Natvarlal Luhana who has been detained at the Porbandar Jail be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

Dt. 7.5.2001. (H.K. Rathod,J.)

Vyas